

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON RAY GILBERT,

Defendant-Appellant.

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UNPUBLISHED

February 9, 2010

No. 289001

Washtenaw Circuit Court

LC No. 08-000541-FH

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of breaking and entering with intent to commit a felony or larceny therein, MCL 750.110. He was sentenced as a fourth habitual offender, MCL 769.12, to six to 20 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On March 25, 2008, Calvin Lewis and his friend, John Agurs, went to Lewis's rental property located at 2350 Ravenwood Avenue in Ypsilanti Township. Lewis was in the process of making repairs to the property. They noticed that the side door to the residence had been kicked in and found defendant inside the home. They confronted defendant, who forced his way out of the home while pulling a crowbar out of his pocket. Police officers found defendant and the crowbar in the basement of a nearby home.

Defendant was charged with first-degree home invasion, MCL 750.110a(2), and chose to waive his right to a jury trial. Immediately after his waiver, the prosecutor moved to amend the information to add a charge of breaking and entering with intent to commit a felony or larceny therein, MCL 750.110, and the trial court granted the motion. At the conclusion of the bench trial, the trial court granted defendant's motion for a directed verdict on the first-degree home invasion charge and convicted him on the added breaking and entering charge.

Defendant argues that his jury trial waiver was not knowingly or voluntarily made because the trial court granted the prosecutor's request to amend the information to add the breaking and entering charge immediately after the waiver. Because defendant did not raise this issue in the trial court, it is not preserved for our review. We review unpreserved allegations of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite the defendant's

actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Moreover, we review for an abuse of discretion a trial court's decision to grant or deny a motion to amend an information. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006).

A criminal defendant enjoys a constitutionally guaranteed right to a jury determination of guilt beyond a reasonable doubt. US Const, Am VI; Const 1963, art 1, § 20; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). A defendant may waive this right, however, with the prosecutor's consent and the trial court's approval. MCL 763.3; MCR 6.401. A valid jury trial waiver must be both knowingly and voluntarily made. MCR 6.402(B); *People v Mosly*, 259 Mich App 90, 95-96; 672 NW2d 897 (2003); *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). Further, regarding the timing of the waiver, MCR 6.402(A) provides:

The court may not accept a waiver of trial by jury until after the defendant has been arraigned or has waived an arraignment on the information, or, in a court where arraignment on the information has been eliminated under MCR 6.113(E), after the defendant has otherwise been provided with a copy of the information, and has been offered an opportunity to consult with a lawyer.

Defendant contends that his jury trial waiver was involuntary and unknowingly made and that the trial court failed to comply with MCR 6.402(A) when it allowed a new charge to be added after the waiver. Defendant has failed to establish a plain error affecting his substantial rights because the record indicates that he was aware of the possibility of the added charge at the time that he waived his right to a jury trial. The prosecutor sought to add the alternative charge because of the character of the home as a rental property. The prosecutor indicated that she wanted to "close the loop hole" should defendant argue during trial that the residence was not a "dwelling" as required for first-degree home invasion.

Although defense counsel objected to the amendment of the information, counsel admitted that the prosecutor had provided sufficient notice of her intent to seek to amend the information. In fact, counsel stated that he, defendant, and the prosecutor had executed a jury trial waiver because the issue involved in this case was "more of a legal issue than a factual issue." Thus, the record shows that defendant was aware at the time that he waived his right to a jury trial that he may have to defend against a breaking and entering charge. Moreover, although the prosecutor moved to amend the information immediately after defendant's waiver, defendant made no attempt to withdraw his waiver. See, generally, *People v Wagner*, 114 Mich App 541, 557-559; 320 NW2d 251 (1982) (discussing withdrawals of jury trial waivers). Accordingly, we conclude that defendant's jury trial waiver was knowingly and voluntarily made. Defendant thus fails to establish a plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

Further, we note that the trial court did not abuse its discretion by granting the prosecutor's motion to amend the information. An information may be amended before, during, or after trial unless doing so would unfairly surprise the defendant or prejudice his defense. MCL 767.76; MCR 6.112(H); *People v McGhee*, 268 Mich App 600, 629; 709 NW2d 595

(2005); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). In determining whether an amendment to an information would unacceptably prejudice a defendant, a court must consider whether the amendment would cause unfair surprise, provide inadequate notice, or an insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

As previously discussed, defense counsel specifically stated that he did not object to the amendment based on insufficient notice. Therefore, the amendment did not cause unfair surprise or provide inadequate notice. Moreover, the amendment did not give defendant an insufficient opportunity to defend against the added charge. The trial court noted that the first three elements of both first-degree home invasion and the added breaking and entering charge were the same. In the context of this case, both offenses required the prosecutor to prove a breaking and entering and that defendant intended to commit a felony or larceny inside the residence. MCL 750.110a(2); MCL 750.110; *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004), quoting MCL 750.110a(2); *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). First-degree home invasion required the prosecutor to prove the additional element that defendant was armed with a dangerous weapon, which defendant did not dispute. MCL 750.110a(2)(a); *Sands*, 261 Mich App at 162. As previously recognized, the primary dispute in this case involved whether the rental home constituted a “dwelling” as required to establish first-degree home invasion. Accordingly, defendant was not provided an insufficient opportunity to defend against the added charge and the trial court did not abuse its discretion by granting the prosecutor’s motion to amend the information.

Affirmed.

/s/ Jane M. Beckering  
/s/ Jane E. Markey  
/s/ Stephen L. Borrello